

# CRIMINAL LAW AND COLONIAL SUBJECT

NEW SOUTH WALES, 1810–1830

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## INTRODUCTION

In 1822 Eleanor Walsh gave evidence to the magistrate at Bringelly of how she and her husband discovered that Henry Crane, servant to Oxley, had killed their heifer and taken the meat: 'I went with my husband to the spot and told him to track the shoemarks on the ground. There were three men, one with very long nails on the side of each shoe, another barefoot, we tracked them to Mr. Hooks.' Her husband could find no evidence of the heifer and so went further, with a constable, to Hassall's farm and then to Oxley's. At Oxley's they went to the carpenter's shop and observed Henry Crane. They saw he had a shoe with three long nails on the side. He tried to swap his shoes with another man in the carpenter's shop but he was arrested and brought before the Bringelly bench with his shoe; the case was sent to the Court of Criminal Jurisdiction. Crane pleaded not guilty, was tried and acquitted.<sup>1</sup>

These events leading to the arrest of Crane were recounted at Birling, the farm of Robert Lowe, magistrate. Eleanor Walsh and her husband stood before Lowe and gave their version of suspicion, evidence and guilt. Her use of tracking, her husband's suspicions of convicts on neighbouring farms and their perceptions of what constituted evidence of Henry Crane's involvement all produced the case. The magistrate Lowe passed the case to the Judge Advocate. Three months later Henry Crane appeared before the Court of Criminal Jurisdiction. To recount tracking and produce a shoe was not sufficient evidence and Crane was acquitted.

In going to court to give evidence, Eleanor Walsh invoked her own understandings of law. The shoemarks and her husband's tracking were enough indication of guilt for her. In studies of early colonial New South Wales historians such as Alan Atkinson, Marion Aveling, Michael Sturma and Portia Robinson have recognised that convict and free had their own notions of morality, marriage and the workings of the convict system.<sup>2</sup> Such an

approach may be extended to a study of criminal law in the early colony. Ordinary people, convict and free, made their own law; they mapped their own boundaries of legality and illegality. They both clashed with and supported the magistrates, judges and juries who interpreted statute law.

The convict system meant that criminal law had greater access to personal life than in England. It also meant that vagrancy law was easily accepted. But freed and free persons also stressed their freedom and argued that they should not be subjected to law. Also, among both administrators and the ordinary population there was different valuing of what it meant to be 'male' and 'female'. This meant that women were more likely to appear before the courts as vagrants than men; they were subject to far more suspicion than men; and they used the courts more for personal disputes than men.

J. B. Hirst in his book *Convict Society and Its Enemies* initially intended to study the free population; but he discovered that the informal workings of the convict system meant 'this was not a society which had to become free: its freedoms were well established from the earliest times'.<sup>3</sup> This study does not reject Hirst's findings. According to legal records; male convicts were able to have their work valued and sell it themselves. Moreover, I argue, the convict system and its informal workings contributed considerably to the modernising of the meaning of 'work' and the criminal law assisted this process as well as, in the countryside; validating a paternalism reminiscent of the colonial plantation. Administrators struggled with measuring and weighing convict labour; 'value' was fraught with difficulty for them, even if we find it an easy term in the twentieth century.

David Neal, a legal historian, has criticised the inadequacy of Hirst's use of the term 'free'; he wants a more solid definition and argues that institutional restrictions on convicts and the lack of legal protection and representation meant that the colony could not be considered free but was a penal colony.<sup>4</sup> While Neal and Hirst work from different paradigms, it may be said that it is true that people in early colonial New South Wales lacked freedom as Neal defines it. However, as we shall see, 'free' and 'freed' were difficult terms also for magistrates and administrators. And, like convicts, the free and freed population made their own definitions of the meaning of freedom. They created their own 'free' world and were prepared to use the law in such a making.

When we consider how 'free' people used the courts, it may be suggested that it was far easier to be convict in early colonial New South Wales than it was to be free. This is because of precisely those difficulties revealed in etymology: the meaning of labour was unclear; the separation of commerce from personal life was far from complete; as in any colonial port the struggle to survive was enormously competitive, and use of criminal law could be incorporated into commerce. The concept of commerce does not have the narrow modern meaning of trade, but was linked to emotion, love, friendship and deceit.

The difficulties of studying the meaning of 'work' also relate to the history of early colonial women.<sup>5</sup> It has been well recognised that the administration held different expectations for the women of early colonial New South Wales. Sexuality was considered far more important than work value. In feminist historiography there has been emphasis on revaluing domestic labour and prostitution: women's work contributed to the economy but was not recognised. It is difficult to separate 'work' in its historical sense from other aspects

of life: the meaning of 'work' for women might cross several spheres of behaviour and emotion. In relating prostitution to a cash nexus, we may neglect its meaning for those who practised it. When we analyse the appearances of domestic servants before the courts in the colony, it is clear that the perspective of employers was not necessarily shared by servants. While their work resembled the cash nexus emerging in domestic service in the late nineteenth century in England, convict women wished to get out of service and 'be on their own hands'. To describe domestic servants as good skilled workers is perhaps to blur several meanings of work in one phrase. Work value and sexuality obsessed colonial administrators; these issues were at the forefront of new fashionable meanings which were being considered in English parliamentary debate. We need not react to them and implicitly follow their definitions in rejecting them. What emerges in a study of the courts and women is not their lack of involvement in commercial dealings—the wide scope of these, including barter and exchange, certainly allowed space for women to be involved—but the harsh realm of suspicion and accusation related to their sexuality. This is the realm in which men and women isolate other women. While legal or common law marriage was valued, as Portia Robinson has recognised,<sup>6</sup> the male's place in that marriage lent him more protection against such accusation.

The interest in etymology is relatively recent in social history in England and Europe.<sup>7</sup> It is history which challenges accepted meanings and assumptions concerning the emergence of the modern state. This has not yet been reflected in Australian historiography for this period. Ethnography has been influential in the detailed study, *Australians 1838* edited by Marion Aveling and the related journal *Push from the Bush*.<sup>8</sup> These approaches to the writing of history have also influenced this author.

This work also emerges from dissatisfactions with Marxist terminology which are evident in Marxist anthropology and history. 'Structure' and 'agency' have been seen as inadequate if not outworn tools to work with.<sup>9</sup> A more subtle approach to analysis of change is required. People do influence the everyday workings of institutions: there is a 'battleground', as Ignatieff suggests, between institutions and those subject to them. If one adopts this perspective one is liable to accusations of emphasising popular agreement with the institutions of an impartial criminal law—as the legal historian Langbein has done.<sup>10</sup> This book rejects the notion of law as impartial or as capable of being impartial: it is bound up with property relations and interest groups. Legal historians have been dogged by the assumption of impartiality and also by the notion of 'crime', both of which are obstacles to analysis.

Historians of law have used court records in several ways. One way is to 'look through' the courts at society, to consider court records as representing the society. The focus of such a study is crime, criminality or the social causation of crime. Such analyses therefore confront a problem which is often considered insurmountable—the 'grey area' of conflict which did not appear before the courts. As George Rude writes:

the repeated caveat voiced by other workers in the field [is that] criminal returns are hopelessly inadequate in providing a full and total picture of crime, both because nineteenth-century authorities kept changing the rules . . . and more significantly because of the delay before full account was taken of crimes known to the police as opposed to before the court.<sup>11</sup>

Rude talks of 'the grey area of unreported crime' and 'the enormity of this problem'.<sup>12</sup> He seeks to deal with it by following Howard Zehr 'in refusing to be intimidated on the very practical grounds that half a loaf is better than no bread and because the present half a loaf will take an adequate account of all prisoners tried at assizes and quarter sessions in selected years'.<sup>13</sup>

Rude's approach looks at 'crime' as behaviour rather than analysing those 'changes in rules' and examining the interaction of community and court. Rude may indeed avoid the problem of 'grey areas', but he still uses court records as an indication of social behaviour.

'Crime' as behaviour was not discussed as a historiographical problem in the work of Hay, Linebaugh and others in *Albion's Fatal Tree*. It was, however, subject to a note in the preface of that book:

It is rather easy when taking a superficial view of eighteenth-century evidence to propose two distinct kinds of offenders. There are 'good' criminals who are premature revolutionaries or reformers, forerunners of popular movements . . . this appears as social crime; and there are those who commit crime without qualification, thieves, robbers, highwaymen, forgers, arsonists and murderers.<sup>14</sup>

The editors of *Albion's Fatal Tree* found that 'it became less possible to sustain any tidy notion of a distinction between these two types of crime . . . we found little evidence of a morally endorsed popular culture here and a deviant subculture there'.<sup>15</sup>

Similarly, George Rude found in his examination of records from Sussex, Gloucestershire and London that it was impossible to delineate a separate 'criminal class', a group of people prone to petty theft, robbery or greater offences.<sup>16</sup> In this note by the editors of *Albion's Fatal Tree*, as in Rude's work, 'crime' is separated from notions of 'deviant persons'; but it is still defined as a social practice, a form of behaviour. 'Crime' is something that happens in society, rather than the result of the interaction of people and court.

The focus of *Albion's Fatal Tree* lay elsewhere;

it appears as if it is not just a matter of 'crime' enlarging but equally of a property conscious oligarchy re-defining, through its legislative power, activities, use rights in common or woods, perquisites in industry, as theft or offences. For as offences appear to multiply so also do statutes—often imposing the sanction of death—which define hitherto innocent or venial activities . . . as crimes. And the ideology of the ruling oligarchy, which places a supreme value upon property, finds its visible and material embodiment above all in the ideology and practice of the law. Tyburn Tree, as William Blake well understood, stood at the heart of this ideology; and its ceremonies were at the heart of the popular culture also.<sup>17</sup>

*Albion's Fatal Tree* introduces another strand of law history, that which focuses on 'changing the rules' rather than looking through the courts at crime and social behaviour. What is examined is the structure and complexity of authority in eighteenth-century England. This analysis was continued by Brewer and Styles. The 'rule of law' was, as they write, 'central to seventeenth- and eighteenth-century Englishmen's understanding of what was special and laudable about their political system . . . [this served as] a potent fiction . . . which commanded widespread assent from both patricians and plebeians'.<sup>18</sup>

*Albion's Fatal Tree* has been criticised by John Langbein on the grounds that it misrepresents the role of law in eighteenth-century society. Langbein argues that the law served

no-one's interests but the victims of crime. Prosecution was undertaken by the lower orders, who also sat on juries—juries that were likely to undervalue goods or to acquit.<sup>19</sup> New measures were enacted because they were reasonable: 'the discretion which characterized this system was not arbitrary and self interested, but rather turned on the good-faith consideration of factors with which ethical decision makers ought to have been concerned'.<sup>20</sup>

Langbein, in turn, has been criticised by Peter Linebaugh, who questioned such a mechanistic view of law. In a defence of *Albion's Fatal Tree*, Linebaugh argues that Langbein sees crime as inherent in society, and that legislators sought to deal with this crime by developing the most efficient system possible. To Linebaugh such an approach is ahistorical. It fails to see law as developing from particular social conditions and interests that were subject to change.<sup>21</sup> Crime is not a constant and law was not in the process of continually refining itself to deal with this 'everpresent' crime.

There is a profound difference between the approach of the legal historian and the approach of the social historian. Douglas Hay addressed the difference between approaches with a geographical analogy:

Historians tell a modern fable about the Law Mountains. It concerns an historian geologist who asked a lawyer climber what he knew about them. The lawyer's answer was (of course) 'Because they are there'. But, persisted the historian 'How did they get there?' 'Why are some aspects so precipitous, others so gentle? What's *inside* the Law Mountains?'<sup>22</sup>

David Philips in 1983 made a similar point in relation to older legal historical work such as that of Radzinowicz. Philips maintained that Radzinowicz

takes a simple linear view of reform as progress . . . there is no place . . . for any notion of reforms urged on the state and adopted by it as a means of improved social control; nor does this approach offer any analysis of how these moves by the state were seen and felt from below, by the people most affected by them'.<sup>23</sup>

To continue the geographical analogy, while the legal historian seeks to track the outline of the Law Mountains, the social historian seeks to understand their formation. Hay's perspective implicitly rejects Langbein's mechanistic view of law; yet Hay's work since *Albion's Fatal Tree* also suggests further complexities in the impact which common people had on the development of law. In 1982 he wrote:

The argument that we should abandon the study of serial crime rates and seek instead to understand only 'criminal justice systems' may be logically untenable. Unless one proves that control is overwhelmingly, irresistibly determinant of indictment levels . . . then officially recorded crime must be the net result of both the behaviour of those subject to law and those controlling it.<sup>24</sup>

He continued:

Until we understand popular attitudes formed at the boundary of appropriation and control, we do not understand the criminal law.<sup>25</sup>

In these statements Hay is still working inside the realm of social causation of 'crime', but the terrain he maps out is a useful starting point because behaviour also involved

perception of law on the part of common people. These were not only perceptions of 'justice' or 'rule of law' but of what constituted an 'offence'.

Michael Ignatieff, in his review of histories of punishment, also begins to think of this terrain which is far less certain than histories of control. He writes of the prison reformers:

The gulf between the reformer's rationalizing intentions and the institutionalized results of their work ought to make us rethink this equation of modernity and rationalization, or at least to give greater room for the idea that modernity is the site of a recurring battle between rationalizing intention and institutions, interests and communities which resist, often with persistent success.<sup>26</sup>

This uncertainty, or recurrent battle, also involves some perception on the part of common people which affects or influences the development of the prison. The uncertainty suggested by both Hay and Ignatieff thus provides good ground from which to question perception of law in colonial New South Wales. The nature of authority and modernity has begun to be seen as subtle and complex.

Though the work suggested by Hay and Ignatieff has not yet begun, the logic and complexity of authority has been the subject of other studies of English law. There is now recognition of localised differences.<sup>27</sup> Authority, though differently defined, has also been of concern in French history. Olwen Hufton in her study of eighteenth-century Languedoc discusses attitudes to authority—how much respect the common man had for *ancien régime* magistrates, tax collectors, landlords, bailiffs, bishops, priests.<sup>28</sup> She discovered, 'there was a sense in which public hatred was the most constant and powerful expression of community solidarity, a binding force in a society otherwise marked by private altercation and fragmentation figures of authority were often recipients of that hatred'.<sup>29</sup> Iain Cameron in his study of the Auvergne and Guyenne between 1720 and 1790 considered extra-legal means of solving disputes and the impression the development of policing in the French countryside made on them. He, too, finds resistance to figures of authority.<sup>30</sup>

While English studies stress the centrality of legal symbolism to structures of authority, these French studies suggest that the authority existing in the French countryside was centred not on law but on tested means of feuding, or assault. Authority, in the form of constables and magistrates, was rejected in favour of the authority of the vendetta. Authority need not always rest, then, on 'rule of law'.

Michael Sturma, in his study of crime and society in the colony, has considered '“moral entrepreneurs”—those who define moral categories and have definitions enforced as public policy, [which] becomes as important as those who are treated as immoral'.<sup>31</sup> He also examines environmental causes of criminal offences. His identification of particularly colonial influences on crime provides an important influence in this work. Sturma's focus was on the 'creation of crime' as a definition, and the ways in which actual offences diverged from that. My own study, however, looks at the way in which the practice of law developed among the ordinary population. Therefore it does not follow the perspective set out by Sturma and should not be seen as an earlier chapter of his work. Nevertheless, his study broke ground in applying theoretical perspectives on crime to a colonial Australian environment.

Australian historians examining the late nineteenth century have concentrated on the development of policing of women, the insane, the family and public space.<sup>32</sup> This work is

influenced by Jacques Donzot and Michel Foucault.<sup>33</sup> Policing is not seen to be simply repressive: it is also considered to be productive. There were gaps in policing practice, such as the underpolicing of criminal abortion;<sup>34</sup> policing was also used to support parents, or to assist illegal economies.<sup>35</sup> In these ways, policing sustained particular social relations 'while being contested by contradictions in those social relations'.<sup>36</sup> Mark Finnane dates the beginning of modern policing from the mid-nineteenth century with the development of police forces.<sup>37</sup> While it is true that in New South Wales there were considerable disjunctions in the policing of public space in the early nineteenth century because of the convict system and the different interests of police magistrates and constables under it, we must recognise that the policing of public space became well entrenched in the colony from 1810. This was not policing of the convict, though aspects of this policing did originate in convict management, but policing of women or the vagrant ex-convict thought unwilling to work. The interests of the grand jury in opposing street vendors or those attempting to sell their labour were the interests of wealthy shopkeepers and merchants. Policing in early colonial New South Wales can also be said to be 'productive', to use Golder and Hogg's term in their essay in *Policing in Australia*; it was particularly productive of illegal economies and may be said to sustain notions of the family. The attentiveness shown to married women raped in the house, for example, meant that the court did move to sustain some aspect of women's relations to men. Unlike Judith Allen, in *Sex and Secrets*, I do not explore gaps in policing, but I do see the history of sex as central to analysis. The colonial administration divided women from men in their structuring of the convict system; the nature of this system resulted in different kinds of surveillance of public space which again delineated women from men. What was 'male' and 'female' in the early colony meant different things to administrators and to the ordinary population, but both regarded women as suspicious if they moved outside the boundaries of these different proper behaviours. Analysis of women or what it is to be 'female' is central to this book.

While I do not wish to use the term 'productive', what becomes apparent in my study of the relationship of people to law is the role of criminal law in modernising labour relations, through the actions of servants as much as of employers; and the role of law in becoming part of the wider market through accusation, informing and reward. The law, for the ordinary population, could become part of the aggressive capitalism which characterised the early economy. It was perhaps this multi-purpose nature of criminal law which gave it strength in the colony. The only serious revolt against the administration, bushranging, became caught up in the system of reward, informing and payment which characterised criminal law. So criminal law did not only protect property relations through enforcing new statutes, as it did in England; it could well become part of those property relations, when property was widely defined. The 'potent fiction' of rule of law perhaps becomes stronger when it contains so many unintended benefits.

Rather than policing producing such a situation, it is from the beginning intrinsically bound up with it. Any public space has many uses; if constables ignore some aspects of use of that space and concentrate on others, the constables in turn are ignored or concentrated on. The point for the inhabitants of colonial New South Wales is: whose world is most important? Where does real power lie? And it must be assumed that there is no neat interconnection between the two. But both administrators and the ordinary population

have notions of what it is to be 'male' and 'female', and this distinction underlies all others. While notions of 'respectability' may not have appeared among the ordinary population, it is clear that the modern notions of work, payment, gender were expressed in the workings, in the practice, of criminal law and that the law, however unintentionally, did help bring them into being.

The inhabitants in early colonial New South Wales could 'take' law from the administrators and statute makers: this is the world we are to explore. It does not help to have a prior notion of criminal law as a 'mechanism', a machine-like entity which on the one hand fairly decides or on the other polices. All criminal law—for those who use it or come under its auspices—is a series of suspicions, hearsay, guilt. Eleanor Walsh, with her tracking, hoped for a conviction. It was from such outrage, real or feigned, that people were hanged. The clear disjunction between this world of formal or informal power relations and the final courtroom hearing is illustrated in Part 4. The first part of this book deals with law and the person. From the beginning of the nineteenth century and particularly in the formation of the colony of New South Wales there was a new interest in persons, their habitations and their bodies. This interest has been noted by Michel Foucault.<sup>38</sup> Part 1, then, considers discursive aspects of law. Part 2 deals with the crisis of bushranging; and it is here that the law as simply discursive is questioned. The offence and its policing combine to produce a culture. Part 3 deals with the use of law by constables and magistrates and administrators, and also by the ordinary population. It further explores that 'taking' of criminal law.

Despite the derivation of New South Wales from English culture and law, it does not necessarily follow that the colony would exhibit the same relations to authority which were evident in England in the eighteenth and early nineteenth century. In New South Wales the crux of legal debate of the day centred on the question, when did a criminal cease to be a criminal? As New South Wales was a colony, and a convict colony at that, how much of English 'right' should prevail? This study cannot be seen neatly to intersect with English research or as providing an earlier chapter for studies of the late nineteenth century. As stated, there is a precedent in Australian social history for the perspective that people influence institutions. There is beginning to be such a perspective in the English history of law. The slow development of analysis in England may partly be the result of the kind of evidence available. In England there has been reliance on the most available document—the indictment, or formal document of committal. The deposition is a bulkier document full of hearsay, drawings, and scraps of material. As a document it is often deemed irrelevant to a study of law.

### *Interpreting Available Evidence*

Records surviving from early colonial New South Wales include depositions, court lists, transcripts, court records and written defences, all of which provide immense detail. The use of this raw material has been the subject of much debate. J. S. Cockburn has considered the court records as incidental information on the structure, habits, worries and recreations of local society, and David Vaissey has enlarged upon such usage: 'it is also from this sort of record that through the extraordinary behaviour of individuals



which brings them to court one is afforded the common behaviour, speech patterns and even gestures of seventeenth-century people.<sup>39</sup>

Though Vaissey can see the wealth of such records, he nevertheless rejects them as evidence on the same grounds as other authors. The use of depositions has often been accompanied by warnings that people, when speaking, are in court and are likely to make up information, to overstate or to underplay their roles. That this might be of significance in itself has not been considered. Court records have been seen as a distortion of social relations. That this distortion might also be part of social relations themselves has not been taken into account.

Historians of popular culture, however, have dealt with similar theoretical problems. In a response to the writings of Michel Foucault, Carlo Ginzberg has asked the question whether popular culture exists outside the act that suppresses it; he concludes that from Foucault's perspective it does not. Rather than tracking the development of discursive institutions, such as the inquisition, the prison, or the system of mental health, as writers like Foucault do, Ginzberg looks closely at the discrepancies between the questions of judges and the replies of the accused.<sup>40</sup> He and writers like E. P. Thompson and Natalie Davis look at contact between the religious and the popular and the worlds created by such a conflict.<sup>41</sup>

Such historical work owes much to anthropology and particularly to its sub-branch, ethnography. George Marcus and Michael Fischer term this approach 'the jeweller's eye view of the world'.<sup>42</sup> Hans Medick has used the anthropologist Clifford Geertz's work to describe the nature of ethnography. Geertz works by 'searching out and analyzing the symbolic norms—words, images, institutions, behaviours,—in terms of which in each place people actually represented themselves to themselves and to one another'.<sup>43</sup> What historians like Ginzberg and Davis have done is to use the methods of anthropology to see how historical change is lived. They have dealt with contradictions, subtleties and compromises in the relations of ordinary people to institutions and power. In looking at court records we are considering the relationship of people to an institution, their input into that institution and their interpretation of it: in short, how law was lived in colonial New South Wales.

Court records can be seen as representations not of social life or the attitudes of common people but of the dynamic relationship between people and law. What do ordinary people understand by guilt, suspicion, evidence, the 'offence'? What are their reference points in cases? If Henry Crane's footprints were not tracked at all and false information was given to court, it was still the snare of suspicion, and his own conviction which led to his appearance. Depositions present their own landscape; they invest particular geographical areas with significance; they describe what a culture thought should be locked, hidden, silenced or spoken of in terms of the law.

So this study deals with the realm of speech and silence: speech that is directed towards committal or acquittal, and silence with similar aims. The importance of what is said and its power has been recognised by anthropologists.<sup>44</sup> Oral historians also have dealt with such questions.<sup>45</sup> Any written record, including Hansard, is subject to question as to its authenticity. In a society where records were transcribed there was great concern for transcription as a skill. Depositions surviving from early colonial New South